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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ANDREW LAWRENCE MOFFETT,** **Defendant and Appellant.**	**A143724** **(Contra Costa County Super. Ct. No. 050513788)**

In 2005, four days before turning 18, Andrew Lawrence Moffett committed an armed robbery, during which his accomplice, Alexander Hamilton, shot and killed a police officer. A jury convicted Moffett of, among other things, first degree murder with felony-murder special circumstance; in 2008, the trial court sentenced Moffett to life imprisonment without the possibility of parole (LWOP), plus an additional 24 years on the remaining charges and enhancements. In Moffett's first appeal, we reversed the peace officer special circumstance for insufficient evidence of intent to kill (Pen. Code, § 190.2)[1] and remanded for resentencing. (*People v. Andrew Lawrence Moffett* (Nov. 9, 2010, A122763) [nonpub. opn.].) On remand, the court again sentenced Moffett to the same term of LWOP plus 24 years.

In Moffett's second appeal (*People v. Andrew Lawrence Moffett* (2012) 209 Cal.App.4th 1465), we remanded for resentencing pursuant to the constitutional standards

[1] All undesignated statutory references are to the Penal Code.

announced in *Miller v. Alabama* (2012) 132 S.Ct. 2455 (*Miller*). The California Supreme Court granted Moffett's petition for review, consolidated his case with a companion case, and "remand[ed] for resentencing in light of the principles set forth in *Miller* and this opinion." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1361 (*Gutierrez*).)

On remand, the trial court considered the factors outlined in *Miller* and *Gutierrez*, and imposed LWOP plus an additional 23 years. In this — his third — appeal, Moffett contends the court erred by imposing LWOP after considering the *Miller* factors, and that his sentence violates the federal and state constitutional prohibitions on cruel and unusual punishment. Moffett also argues, and the People agree, the court erred by imposing a restitution fine (§ 1202.4) on a stayed conviction and that the abstract of judgment must be corrected.

We modify the sentencing minute order and abstract of judgment. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Underlying Facts

In late April 2005, Moffett and Hamilton "robbed a Raley's supermarket in Pittsburg and a Wells Fargo bank located inside the store. At the time, Moffett was 17 years old, and Hamilton was 18 years old.

"Moffett enlisted a friend, Elijah Moore, to steal a getaway car in exchange for some marijuana. After driving the car to the Raley's parking lot, Moffett and Hamilton entered the store shortly before 5:47 p.m. wearing facial coverings and carrying semiautomatic handguns. Moffett approached a checkout stand manned by Rima Bosso, pointed his gun at her head, and demanded that she give him the money. Flustered, Bosso could not get the register drawer to open. Moffett put his gun against her left ear and said, 'Come on, bitch. Come on, bitch. You're taking too fucking long.' The drawer eventually opened, and Bosso put about $800 in a bag. While Moffett was

[2] The underlying facts are taken from our high court's opinion in *Gutierrez, supra,* 58 Cal.4th at pages 1361 to 1362. By separate order, we granted Moffett's request for judicial notice of the records in his prior appeals.

robbing Bosso, Hamilton approached the counter of the Wells Fargo bank, pointed a gun in the direction of the two tellers, and demanded money. The tellers put $3,000 in a bag Hamilton was carrying.

"Moffett and Hamilton ran out of the store and attempted to flee in the stolen car, but Hamilton soon crashed the vehicle into the back of a pickup truck parked on the street. Moffett and Hamilton then got out of the car and started running. Moffett told a neighbor who was chasing them, 'Stop or I'll cap you, motherfucker.' Moffett and Hamilton continued running through the yards of several homes near the Delta de Anza Regional Trail, scaling fences as they went.

"Pittsburg Police Officers John Florance and Larry Lasater arrived at the Delta de Anza Regional Trail at 5:58 p.m. Officer Lasater saw a dark figure standing by a tree and called out, 'Is that someone down there?' The figure disappeared into the greenery, and Officer Lasater gave chase. After running for some distance, Officer Lasater stopped, drew his weapon, and started walking toward where the figure had disappeared. Around this time, Officer Florance heard the sound of someone jumping over a fence. He then saw Officer Lasater point his gun downward and shout, 'Show me your hands.'

"Hamilton, who was lying down in the bushes, fired several shots at Officer Lasater. One of the bullets shattered a vertebra in Officer Lasater's neck, and another went through his calf. When additional officers responded to the scene to assist Officer Lasater, Hamilton fired shots at them until he ran out of ammunition and was taken into custody. The wound to Officer Lasater's neck proved fatal.

"Meanwhile, Moffett had jumped the fence adjacent to the site of the shooting and continued running through the neighborhood. At one point, a woman saw him about to enter her garage. She yelled, 'no,' and Moffett ran across the street. At around 6:35 p.m., officers discovered Moffett lying shirtless in a fetal position under a tree where he surrendered, saying, 'don't kill me.'

"Following a joint trial with Hamilton, Moffett was convicted of one count of first degree murder, three counts of second degree robbery, and one count of driving a stolen vehicle. (Pen. Code, §§ 187, 211; Veh. Code, § 10851.) The jury also found true three

felony-murder special-circumstance allegations, one killing of a peace officer special-circumstance allegation, and firearm use allegations as to the murder and robbery counts. (Pen. Code, §§ 190.2, subd. (a)(7) & (17); 12022.53, subd. (b).)" (*Gutierrez, supra,* 58 Cal.4th at pp. 1361-1362.)

Resentencing on Remand

A. The Prosecution's Sentencing Memorandum and the Probation Department's Report

The prosecution's October 2014 sentencing memorandum outlined the *Miller* factors and recommended the court sentence Moffett to LWOP on the first degree murder conviction. Additionally, and citing *Holloway v. U.S.* (1999) 526 U.S. 1, the prosecution argued Moffett possessed a conditional intent to kill.

The probation department's report outlined the *Miller* factors and recommended the harshest penalty. First, the report described Moffett's family history and upbringing: the only child of never-married parents, Moffett was raised by his grandparents in Pittsburg. Moffett attended "traditional school" until seventh grade. He was expelled from high school for stealing. Moffett was "given the opportunity to complete his education and had little prior exposure to violence." There was "no evidence of child abuse or neglect." Moffett was not "diagnosed with any psychological or physical trauma, was not a victim of abuse, was not under any undue stress, and was not found to have any developed mental disabilities[.]" As a teenager, Moffett moved to Oakland to live with his mother. Moffett's father did not raise him, and Moffett was apparently unaware of his father's "extensive criminal history[.]"

The probation report also described Moffett's criminal history, which began at age 14, for possessing marijuana for sale. The juvenile court adjudged Moffett a ward of the court and placed him on probation. He failed to comply with the terms of probation and accumulated new charges, probation violations, "and was continually ordered detained in juvenile hall[.]" Moffett was arrested for shooting an 18-year-old with a BB gun, "for no apparent reason other than perceived disrespect" and for possessing "20 rocks of cocaine, refusing to comply with police instruction and giving police a false name and birth date."

Moffett had felony adjudications for possessing marijuana for sale and receiving stolen property, and misdemeanor adjudications for assault with a deadly weapon, possession of controlled substances, and resisting arrest. Moffett used alcohol, marijuana, and cocaine. He blamed a 2003 positive cocaine test on "'something that [he] touched.'"

Next, the probation report described Moffett's behavior while incarcerated. In juvenile hall, Moffett had "numerous incident reports for engaging in riotous behavior, failing to follow instructions, fighting and causing disturbances." Moffett had 142 negative write-ups, 3 special incident reports, and 15 behavioral progress reports. "These reports involved disturbance of the unit, fighting, . . . contraband, disrespect to staff, [and] gang writing[.]" While awaiting trial on the 2005 offenses, Moffett fought with other inmates, destroyed jail property, and possessed a shank. He refused to obey orders, obstructed a peace officer, and made inappropriate and demoralizing comments toward female staff.

The probation report also described Moffett's role in planning and executing the robbery. In April 2005, Moffett was on probation. He was four days shy of turning 18. Moffett made a "thought-out, informed decision" — without peer pressure — to violate probation and travel to Contra Costa County. Then Moffett enlisted the help of friends to steal a getaway car, and obtain masks, semi-automatic handguns, and ammunition used in the robbery. Moffett "took a lead role" in planning and executing the armed robbery, and his behavior was "not the behavior of a minor acting impulsively. It is more the act of an older, criminally sophisticated person, with the ability to plan, and lead a violent offense." Pointing a loaded gun at the cashier illustrated Moffett's "willingness and intent to hurt, maim or kill the victim if needed" and a "criminal sophistication, which is gained, and a lack of empathy and sympathy for others, a trait that may have been missing when he was born and cannot be taught." Moffett also threatened to kill a bystander, displaying his "criminal sophistication and inability to care for others[.]" The probation department opined Moffett "did not show immaturity, impetuosity, or failure to appreciate risks and consequences."

According to the probation department, the circumstances of the offense — coupled with Moffett's juvenile record — demonstrated he "did not have a diminished culpability at the time of the instant offense, nor did he have a heightened capacity for change at the instant offense." Instead, Moffett was "a rare offender who displays irreparable corruption. [¶] . . . [¶] Throughout [Moffett's] juvenile history, he has shown no remorse, no empathy, no sympathy and no willingness to improve his life, nor make restitution or repair the damage he has done." The probation department determined Moffett was not interested in, nor amenable to, rehabilitation. According to probation, Moffett's "character was well formed at the time of the instant offense. His traits were fixed and his actions were sophisticated and planned . . . [¶] [Moffett] was given many opportunities for assistance towards rehabilitation and he rejected them all."

In a supplemental report, the probation department described a phone interview with Moffett, who said he wanted to attend college and care for his family, and that he was "becoming more interested in social issues, especially recidivism to juvenile hall[.]" Moffett had "not thought of working" if released from prison; when asked what he would do for work, Moffett claimed he "would find a . . . job in music or writing." He wanted to "be a positive asset to the community." Moffett received his GED in custody and was working toward a high school diploma. He participated in programs while incarcerated. During the phone interview, Moffett seemed "more concerned" with telling the probation officer what he thought the officer "wanted to hear, rather than the truth"; it seemed Moffett was "'play[ing] the game' to [get] released." The probation department opined Moffett was "still not interested in rehabilitation."

B. Defense Sentencing Memorandum and Supporting Expert Report

Moffett's sentencing memorandum urged the court to not impose LWOP. The sentencing memorandum criticized the probation report for lacking objectivity and claimed Moffett was "trying to rehabilitate himself." In addition to obtaining his GED, Moffett had completed peer education business classes and an anger management program, which demonstrated a desire to improve himself. Moffett offered an October 2014 report prepared by psychiatrist Eugene Schoenfeld, M.D., who described Moffett as

"'highly sensitive[,]'" "'likely to be influenced by other people[,]'" and not "'fully mature emotionally.'" According to Dr. Schoenfeld, Moffett could be "'naïve and immature, and may appear to behave younger than he is.'" Dr. Schoenfeld noted Moffett "regularly used marijuana from at least the age of 14," and that "regular use of marijuana by adolescents delays psychological maturation, including judgment and insight." Dr. Schoenfeld described Moffett as "'resentful of his childhood home'" and his family as "very dysfunctional." According to Dr. Schoenfeld, Moffett acknowledged his mistakes and expressed remorse for the offenses.

C. October 2014 Resentencing Hearing

Moffett testified at the resentencing hearing. He gave Hamilton the gun used to kill Officer Lasater, and he possessed a gun during the robbery. Moffett did not intend to shoot anyone, and denied wanting to harm anyone during the robbery. Moffett had been involved in prison altercations and made inappropriate comments to a female guard. He obtained his GED and "the next step . . . is to go to college." Moffett was trying to "get involved" in prison classes and programs. If he were released from prison at age 67, he would not "start robbing people[.]"

Moffett wanted to hold himself "accountable for [his] actions" and felt "remorseful in the terms of what happened of another individual committing the act that he committed. . . You know, I wasn't there; but . . . as far as my . . . culpability is concerned that if I didn't make the choices that I made that day, . . . things could have been different. . . . So regardless of what had happened . . . it was implemented by me. And . . . I feel very remorseful . . . . And I feel compassion for the family. [¶] And . . . I'm just trying to close the chapter in my life[.]" On cross-examination, Moffett testified he wanted to ask Officer Lasater's family for forgiveness because he "made a mistake. My acts led up to this event. And today, I'm being responsible for my actions, holding myself accountable. . . And that should show some maturity . . . some growth." Moffett also claimed the felony murder rule "overstretch[ed]" his responsibility for the crime.

Dr. Schoenfeld testified as an expert in psychiatric mental health. Schoenfeld described Moffett's upbringing as "disruptive" and noted Moffett's father beat his mother

while she was pregnant with Moffett, and after he was born. Moffett began using drugs around the time his father "went to jail for weapons charges, drugs, and assault[.]" Dr. Schoenfeld reiterated the conclusions in his report: the *Miller* factors, Moffett's personality, and the effects of chronic drug use on adolescent development. According to Dr. Schoenfeld, there was no "chromosomal testing" supporting the probation department's conclusion that Moffett may have been born with a lack of empathy or a propensity for violence. Dr. Schoenfeld stated there was a "possibility of rehabilitation . . . far in the future" and that Moffett was not the "rare juvenile offender whose crime reflects irreparable corruption[.]" As Dr. Schoenfeld explained, "there's no evidence [Moffett] cannot . . . learn to act differently and to control himself in the future[.]"

After hearing victim impact statements, a statement from Moffett's father, and argument from counsel, the court imposed LWOP on the murder charge. The court listed the evidence it considered, described the *Miller* factors, and noted the probation officer's opinions were not a "big, if any" part of the court's sentencing determination. The court explained: "The question is whether [Moffett] can be deemed at the time of sentencing to be irreparably corrupt beyond redemption and, thus, unfit ever to reenter society. . . ." and continued:

"I am starting the sentencing from scratch. I will address each of these factors individually.

"Mr. Moffett was four days shy of his 18th birthday when this event occurred. Dr. Schoenfeld states in his report that the psychological testing he performed on Mr. Moffett, the MMPI-2 done on September 18th, 2014, indicates that Mr. Moffett has trouble at times expressing his feelings, doesn't understand himself well, is susceptible to passing influences, and may be led into acting without stopping to consider the consequences, can be naive and immature, gets along well in a group, is careful, accurate, and has self-control. He concludes that he is not fully mature emotionally.

"Some of these attributes clearly describe common characteristics found in most teenagers but are also found in young people well into their 20's, sometimes 30's. What was of note, though, were the findings that he gets along in a group, is sociable, careful,

accurate, and has self-control. These findings of careful and self-control are in direct contradiction to the test results indicating impulsivity and immaturity.

"The evidence at trial was that Mr. Moffett left Sacramento in violation of his probation order, where he lived with his mother shortly before this event. He solicited a friend to steal a car in exchange for some marijuana which was later used to drive to and away from the Raley's store where the robberies occurred. Guns, masks, and gloves were obtained ahead of time; again, evidence of careful planning as opposed to an impulsive, spur-of-the-moment event. This indicates prior thought and planning of the robbery, as opposed to impulsive behavior as we see in some robbery/homicides where they occur on the spur of the moment or the non-shooter defendant has a more passive or follower role. For example, the getaway driver or the lookout or the unarmed accomplice.

"I will talk about this in greater depth later. But the actions Mr. Moffett took on the day of this event were not the actions of a child or one who is influenced and guided by others. He was an active, full participant that engaged in a violent takeover-style armed robbery which apparently, according to his testimony today, he planned, as well as extremely threatening and dangerous behavior towards residents of the neighborhood where the homicide took place.

"Mr. Moffett's not insignificant juvenile history involves criminal activity and behavior that does not necessarily indicate immaturity, but clearly does indicate repeated violations of the law and conditions and requirements of his various probation grants. His convictions include a felony violation of Health & Safety Code section 11359, possession of marijuana for sale; a misdemeanor violation of . . . section 245, which was originally charged as a felony, which the probation report describes as shooting an 18-year-old approximately four times with a C02-powered BB gun; what appears to be a misdemeanor violation of possession of marijuana; and receiving stolen property, and it's unclear whether this was a misdemeanor or a felony. I'll assume it's a misdemeanor for purposes of this discussion. It may have been a felony, I can't tell. There were multiple violations of each probation grant. His behavior at juvenile custody and placement is

replete with fighting, peer conflicts, possession of contraband, gang-oriented activity, and disrespect and oppositional behavior towards the staff.

"Mr. Moffett's behavior in jail custody after this incident follows the same pattern, with fights with other inmates, illegal weapon possession, possession of contraband, disrespect, and oppositional and defiant behavior towards jail staff.

"Again, in state prison, after sentencing, Mr. Moffett continued behaving in a similar manner, including fighting with other inmates, failure to follow prison rules and correctional officers' instruction, oppositional and defiant behavior, and at least one incident of sexual harassment towards a female guard. I am somewhat troubled by the fact that Dr. Schoenfeld characterized this incident as 'flirting.'

"There is little to support a finding on this record that Mr. Moffett was acting in an immature and impulsive manner during the course of this event.

"As to Mr. Moffett's family and home environment, there is little in this record in front of the Court that Mr. Moffett had an abusive or necessarily dysfunctional home environment. It appears that Mr. Moffett was raised by a single mother, as well as, primarily, his grandparents. Although, his father apparently had a serious criminal history and apparently was incarcerated when Mr. Moffett was approximately 14 — that's the best I can figure out from the information that we got today from Dr. Schoenfeld — according to the information his mother related to Dr. Schoenfeld two days ago, his father, although abusive to her during the pregnancy and directly after was not physically abusive to Mr. Moffett; and his father apparently did not live in the household with Mr. Moffett and his mother. So it's unclear whether Mr. Moffett was aware of or witnessed any of the domestic violence between his parents.

"Mr. Moffett's father visited him at his grandparents' home, according to the information that Dr. Schoenfeld got. And Mr. Moffett, interestingly, describes his childhood to probation as happy and healthy. Now, I don't want to discount in any way the effect of domestic violence on a child, we see that unfortunately often here, but I have no information that he witnessed it; and unless he was in the household and witnessed it when it occurred, I can't assume that it affected his childhood growing up.

"There is no suggestion from any source that his mother or grandparents were abusive. I heard today for the first time his father indicated to the Court that his mother was using marijuana. There is no information that the mother or grandparents who were his primary parents were absent or neglectful or that the home environment was harmful. I just don't have that information. His father did complain, apparently, that he felt Mr. Moffett's mother was not adequately supervising him, but there is no further information about this.

"We see many cases where children grow up in physically abusive situations, are surrounded by drugs, alcohol, and violence and have no real parental figure to raise them, they are essentially raising themselves on the street and then end up before the Court after having committed violent crimes. We have no CPS reports, police reports, school reports, witness testimony, or declarations, other than, frankly, what was added today that that was experienced by Mr. Moffett.

"Dr. Schoenfeld's report indicates that Mr. Moffett's family life was very dysfunctional, as his father was incarcerated for drugs, weapons, and assaults, and he was raised by a single parent and grandparents. The report faults the probation report for glossing over any problems he had as a child, as a result of this, and states that Mr. Moffett doesn't like to admit to or discuss any details about his family life. Again, without some information from some source that his grandparents and/or his mother did not properly provide for him, there is no evidence that, in fact, his upbringing was wanting. Few people are raised in a perfect home environment; and many, many single parents and grandparents raise children who make their way in the world without resorting to violent criminal behavior. Being raised by a single parent and/or a grandparent is not, by itself, dysfunctional.

"As to Mr. Moffett's drug use, there is mention in both the probation report and Dr. Schoenfeld's report of marijuana and cocaine use. But not much additional information about when, how, how much, and how, if any, that the drug abuse affected his behavior. I was disappointed to hear that Dr. Schoenfeld did not ask some basic

questions that I would have expected, and that would have been about Mr. Moffett's drug use. He had the opportunity to talk to Mr. Moffett about that.

"The Court notes the information provided in Dr. Schoenfeld's report that drug use can delay the maturation process in young people. I can't make any assumptions about Mr. Moffett's drug use, what drug he was using. And I cannot conclude that it is chronic from the information that is in front of me.

"As for the crime itself, this event started with a car theft that was planned and organized by the defendant. Mr. Moffett and Mr. Hamilton entered a busy grocery store, armed, loaded weapons, that we found out today, Mr. Moffett provided, with masks and gloves on and immediately confronted different employees in different areas of the store demanding money. This was clearly planned ahead of time as Mr. Hamilton immediately went to the in-store bank, Wells Fargo at the front of the store, and Mr. Moffett headed directly to a store cashier. Mr. Moffett threatened the cashier with a gun pointed at her, demanding money in an extremely threatening way and when she did not act fast enough because she couldn't get the cash register open, actually put the gun to her head and told her she was taking too long. When he saw another employee watching, he stated, quote, 'What the fuck are you looking at,' which caused that employee to go to the ground.

"After both obtained money by force and threats of violence, they fled from the store in a stolen car into a nearby neighborhood where Mr. Hamilton, who was driving and that may be in dispute as of today — crashed into a parked truck. Both defendants ran from the car and started towards a fence. Mr. Moffett dropped his gun and then picked it back up again. As one of two residents in the area started to approach, Mr. Moffett threatened — this is the quote we have — quote, Stop or I'll cap you, motherfucker, and then ran off with Mr. Hamilton through neighborhood backyards and over fences leaving behind gloves, footprints, and some money.

"Although it is unknown, still, exactly where Mr. Moffett was when Officer Lasater was shot, he had gun residue on his hand when he was apprehended which tells us that he either shot a gun or was in close proximity to one when it was fired.

"Mr. Moffett ran from the scene of the homicide into the neighborhood and was seen by residents in several yards. Mr. Moffett hid his fully-loaded and charged gun in a plant in one backyard and dumped the money in another.

"Mr. Moffett's shoe print was found approximately 10 feet from where Officer Lasater's unfired weapon was found, where he fell fatally wounded. And Mr. Moffett's cell phone was found where Mr. Hamilton had hidden in the tall weeds, along with numerous expended shell casings.

"Although Mr. Moffett was not the shooter in this homicide, he very actively participated in and planned all the event[s] that led directly up to Officer Lasater's murder. His role was not a passive participant, nor was he a parental [*sic*] player as compared with cases we often see, were those cited by the defense previously.

"The actions taken on this day of this event were not those of an irresponsible or impulsive child, nor were they the product of peer pressure or coercion by others or surprise. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victims in this case.

"As for the fourth factor, there is no indication that the prosecution could have, would have, or did offer Mr. Moffett a reduction in charges by way of a plea bargain. There is also no indication in the record that Mr. Moffett was not able to communicate with or assist his legal counsel at any time during the history of this case.

"To the contrary, Mr. Moffett was an active participant in his defense. And the record, which was mostly out of the presence of the prosecutor, supports this. Those in camera discussions are part of the record in this case.

"The fifth criteria is the possibility of rehabilitation. Mr. Moffett is clearly a very smart, young man. Unlike many cases, this Court has had the opportunity to both observe Mr. Moffett during the proceedings and engage in conversations with him during several in camera discussions. Again, these are part of the record in this case and available for review. Mr. Moffett, although not well-schooled, is intelligent, observant, logical, and is able to express himself well.

"Although I may not have agreed with his assertions or conclusions, I cannot find them to be irrational, immature, or childlike. And it was clear he gave a great deal of thought to his case and how it was presented.

"Mr. Moffett is to be commended for getting his GED and high school diploma while incarcerated and that he has availed himself of some classes. The Court would note, however, that one of the certificates is commending him for attending a class weekly for approximately two-and-a-half months and another for successful participation in another two-month class. The third certificate is attendance at seven anger management sessions.

"The defense has also presented evidence in Dr. Schoenfeld's report that Mr. Moffett expressed remorse during his interview with him in September of 2014. I will also note Mr. Moffett's comments today to the Court. The Court would note, though, that this is the first time that there is evidence of expression of remorse. And we've been in court together quite a few times.

"The conversation that defense counsel refers to in his sentencing memorandum regarding a taped conversation between the defendants after they were arrested for this offense, having to do with asking for forgiveness, is not before the Court. I don't have that, and that's never been presented to me, so I can't consider that.

"Unfortunately, despite these attributes, Mr. Moffett's behavior in and out of custody from the age of 14 till the present, does not allow me in good conscience to consider this a case of a juvenile offender whose crime reflects unfortunate yet transient immaturity. Mr. Moffett's juvenile history coupled with his behavior and actions while in custody, before, during and after the trial, along with the facts and circumstances of the crimes themselves, cannot support a finding of immaturity. Quite the contrary.

"This Court does not find that there is a realistic chance of rehabilitation in this case.

"I want to acknowledge the impact of this event on Officer Lasater's family, as well as the victims of the robberies, which I spoke about before. My focus today on the *Miller* factors doesn't diminish that.

"The law vests in the Trial Court the discretion to sentence a 16- or 17-year-old in cases such as this to life with the possibility of parole, 25 years to life, or life without the possibility of parole with no presumption in favor of life without the possibility of parole.

"Based on my evaluation of the facts and circumstances of this case and the five factors outlined by the Supreme Court discussed above, I find that Mr. Moffett fits into that small category of juvenile defendants where life without the possibility of parole is the appropriate sentence.

"I will sentence Mr. Moffett as follows: On Count One, a violation of . . . section 187, first degree murder, I will sentence Mr. Moffett to life without the possibility of parole. I will impose the ten-year enhancement for a weapon, pursuant to . . . section 12022.53(b), to run consecutive to the other determinate sentences. This sentence is to run consecutive to Counts Two, Three, Four, and Seven. . . ."

DISCUSSION

I.

No Abuse of Discretion in Imposing LWOP on the First Degree Murder Conviction

Moffett's first claim is the court erred by imposing LWOP. Numerous cases have summarized the evolution of the law regarding sentencing of juvenile offenders, and we need not restate it here. (See, e.g., *People v. Franklin* (2016) 63 Cal.4th 261, 273-275; *People v. Bell* (2016) 3 Cal.App.5th 865, 873-874.) "Under *Miller*, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with *Miller*." (*Gutierrez, supra*, 58 Cal.4th at p. 1379.) The *Miller* factors are: (1) a juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds [the juvenile offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of [the juvenile offender's] participation in the conduct and the way familial and peer pressures may have affected

him"; (4) whether the juvenile offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys'"; and (5) "the possibility of rehabilitation." (*Miller, supra,* 132 S.Ct. at p. 2468; see also *Gutierrez, supra,* 58 Cal.4th at pp. 1388-1389.)

Miller "requires a trial court, in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender. [Citation.]" (*Gutierrez, supra,* 58 Cal.4th at p. 1361, citing *Miller, supra,* 132 S.Ct. at p. 2465.) Here, the question for the trial court was whether Moffett "can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults. [Citation.]" (*Gutierrez, supra,* 58 Cal.4th at p. 1391.)

The trial court considered this question and determined there was not "a realistic chance" Moffett could be rehabilitated and that he fit "into that small category of juvenile defendants where life without the possibility of parole is the appropriate sentence." This conclusion was not an abuse of discretion. "A court's exercise of discretion will not be disturbed on appeal absent a showing that the court acted in an arbitrary, capricious, or patently absurd way, resulting in a manifest miscarriage of justice. [Citation.] . . . 'A "'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."'" [Citation.]" (*People v. Blackwell* (2016) 3 Cal.App.5th 166, 199-200 (*Blackwell*) ptn. for review pending, ptn. filed Oct. 9, 2016, S237862.)

Here, the court considered the *Miller/Gutierrez* factors, including Moffett's age and Dr. Schoenfeld's description of Moffett as naïve, immature, and impulsive. The court also observed Moffett was "sociable, careful, accurate," possessed self-control, and that Moffett's role in planning and executing the robbery demonstrated he was not

impulsive or immature. After recounting the circumstances of the murder in detail, the court observed Moffett's actions were "not those of an irresponsible or impulsive child, nor were they the product of peer pressure or coercion by others or surprise. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victims in this case." Next, the court considered Moffett's family and home environment — including his father's criminal history and the domestic violence between his parents — but noted "there is little" evidence Moffett had an abusive or dysfunctional home environment. Moffett was raised by his grandparents and described his childhood as "happy and healthy." There was "no information" Moffett witnessed domestic violence between his parents, or that "it affected his childhood growing up."

Third, the court examined the circumstances of, and Moffett's participation in, the murder. It noted "this event started with a car theft" that Moffett carefully planned. He traveled to Contra Costa County in violation of a court order and obtained weapons, masks, and a getaway car "ahead of time . . . evidence of careful planning as opposed to an impulsive, spur-of-the-moment event. This indicates prior thought and planning . . . as opposed to impulsive behavior . . . ." Moffett put a loaded gun to the cashier's head and threatened to shoot a bystander. The court noted it was "unknown . . . exactly where Mr. Moffett was when Officer Lasater was shot, [but Moffett] had gun residue on his hand when he was apprehended which tells us that he either shot a gun or was in close proximity to one when it was fired." Moffett's shoe print was approximately 10 feet from where Officer Lasater's "unfired weapon was found, where he fell fatally wounded. And Mr. Moffett's cell phone was found where Mr. Hamilton had hidden in the tall weeds, along with numerous expended shell casings."

Fourth, the court — which had "the opportunity to both observe Mr. Moffett during the proceedings and engage in conversations with him during several in camera discussions" — described Moffett as "intelligent, observant, logical, and . . . able to express himself well." The court noted there was no indication of a plea offer or reduction in charges, nor evidence Moffett was not able to assist his counsel in the case. Finally, the court considered the possibility of rehabilitation, commending Moffett on

obtaining his GED and high school diploma while incarcerated, and noting Moffett expressed remorse. The court, however, observed there was not a "realistic chance of rehabilitation" because Moffett had an extensive juvenile record involving weapons and violence, had been provided numerous opportunities within the juvenile system to reform, but his criminal behavior escalated. Officer Lasater's murder was committed while Moffett was on probation.

"The trial court was well aware that it had discretion to sentence [Moffett] to 25 years to life or LWOP and that the latter sentence should be reserved for the '"rare juvenile offender whose crime reflects irreparable corruption."' [Citation.] In selecting LWOP as the appropriate sentence, based primarily on [Moffett']s circumstances and the heinous nature of the offense, the trial court did not abuse its discretion." (*Blackwell, supra,* 3 Cal.App.5th at p. 201.) Moffett's argument to the contrary is unpersuasive, and his alternate view of the evidence does not demonstrate the court abused its discretion by imposing LWOP.

Moffett suggests the court's failure to refer to his "twice-diminished culpability" should invalidate the LWOP sentence. We are not persuaded. In our 2012 prior opinion, we directed the trial court to give "appropriate weight to the fact that [Moffett] was a non-killer convicted under the felony-murder rule." (*Moffett, supra,* 209 Cal.App.4th at p. 1477.) At the October 2014 resentencing hearing, the trial court did so, noting Moffett "was not the shooter," implicitly considering his "'twice-diminished moral culpability' when making its sentencing decision." (*Id.* at p. 1478; see also *Gutierrez, supra,* 58 Cal.4th at p. 1389 ["'"juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"'"].)

Moffett contends two recent decisions — *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718] (*Montgomery*) and *People v. Padilla* (2016) 4 Cal.App.5th 656 (*Padilla*) — require reversal of the LWOP term.[3] In *Montgomery*, the United States

[3] *Montgomery* was decided while this appeal was pending. After briefing was complete, Moffett directed our attention to *Padilla*; we requested and received supplemental briefing on *Padilla*.

Supreme Court held *Miller* applies retroactively on collateral review. In reaching that conclusion, the *Montgomery* court observed, "Because *Miller* determined that sentencing a child to [LWOP] is excessive for all but '"the rare juvenile offender whose crime reflects irreparable corruption,"' [citation], it rendered [LWOP] an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. . . . [¶] . . . Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to [LWOP]. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. . . . *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." (*Montgomery*, at p. 734.)

In *Padilla*, a jury convicted the defendant of a murder he committed when he was 16 and the trial court sentenced him to LWOP. In a petition for writ of habeas corpus, the defendant sought resentencing in light of *Miller*; he submitted "several reports and declarations regarding his potential for rehabilitation and conduct while in prison[,]" including one report opining he "had 'great potential' for rehabilitation[.]" (*Padilla*, *supra*, 4 Cal.App.5th at p. 669.) The trial court held a resentencing hearing and reimposed the LWOP term. (*Id.* at p. 659.) Following that ruling, the United States Supreme Court decided *Montgomery*. (*Ibid.*)

The *Padilla* court examined *Miller* and *Montgomery*, noting: "The application of *Miller* in state collateral review proceedings thus targets a specific question—that is, whether the juvenile offender's crime arose from irreparable corruption, rather than transient immaturity—the focal point of which is the existence of '"permanent incorrigibility."' [Citation.] [¶] . . . [¶] In our view, the stringent standard set forth in *Montgomery* cannot be satisfied unless the trial court, in imposing an LWOP term, determines that in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity. . . . In view of *Montgomery*, the trial court must assess the *Miller* factors with an eye to making an express determination whether the juvenile offender's crime reflects

permanent incorrigibility arising from irreparable corruption." (*Padilla, supra,* 4 Cal.App.5th at pp. 672-673, fn. omitted.)

Padilla reversed and remanded for a new resentencing hearing, concluding the trial court "exercised its discretion in resentencing . . . without the guidance provided by *Montgomery*[.]" (*Padilla, supra,* 4 Cal.App.5th at p. 659.) The *Padilla* court explained: "In reimposing the LWOP term, the court neither stated that appellant was irreparably corrupt nor made a determination of permanent incorrigibility. Rather, the court focused on the circumstances of the crime, without reference to the evidence bearing on appellant's possibility of rehabilitation. In short, in resentencing appellant, the court did not apply the substantive rule *Montgomery* has now stated *Miller* established." (*Id.* at pp. 673-674.)

Neither *Montgomery* nor *Padilla* alter our conclusion. Here, the trial court considered the *Miller* factors in great detail. At the resentencing hearing, the court noted: "The question is whether [Moffett] can be deemed at the time of sentencing to be irreparably corrupt beyond redemption and, thus, unfit ever to reenter society. . . ." It determined Moffett was not a "juvenile offender whose crime reflects unfortunate yet transient immaturity" that there was not "a realistic chance of rehabilitation in this case," and that *Moffett* fit "into that small category of juvenile defendants where life without the possibility of parole is the appropriate sentence." This is not a situation like the one in *Padilla*, where the court focused on the circumstances of the defendant's crime without considering the evidence supporting the possibility of rehabilitation and without making a determination of incorrigibility. (*Padilla, supra,* 4 Cal.App.5th at pp. 673-674.) Nor is Moffett like the defendant in *Padilla*, who offered substantial evidence supporting the possibility of rehabilitation. (*Id.* at pp. 669-670.) Here, the court considered the limited evidence supporting the possibility Moffett could be rehabilitated, and determined there was not a "realistic chance of rehabilitation" and that Moffett was not a "juvenile offender whose crime reflects unfortunate yet transient immaturity."

We conclude the court did not abuse its discretion by resentencing Moffett to LWOP.

II.

No Violation of the State or Federal Constitutional Prohibition on Cruel and Unusual Punishment

"The Eighth Amendment to the United States Constitution prohibits 'cruel and unusual punishments' and 'contains a "narrow proportionality principle" that "applies to noncapital sentences."' [Citations.] This constitutional right '"flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense.' [Citations.]" (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 64.) Relying on *Graham v. Florida* (2010) 560 U.S. 48, Moffett contends the Eighth Amendment categorically bars imposing LWOP on a juvenile offender who "neither kills nor intends to kill." In *Blackwell*, we considered — and rejected — this argument. (See *Blackwell, supra,* 3 Cal.App.5th at pp. 195-197.)[4]

Moffett also claims the sentence was cruel and unusual in violation of the California Constitution and *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*). Successful challenges to a LWOP sentence based on *Dillon* are extremely rare. (See e.g., *In re Nuñez* (2009) 173 Cal.App.4th 709, 725 ["rarest of the rare"]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["exquisite rarity"]; *People v. Em* (2009) 171 Cal.App.4th 964, 977 [""'exceedingly rare'"" and appear only in an ""'extreme'"" case].)

"'To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is "grossly disproportionate to the defendant's individual culpability" [citation], so that the punishment ""'shocks the conscience and offends

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[4] Moffett's reliance on various out-of-state cases, including *State v. Seats* (Iowa 2015) 865 N.W.2d 545 and *Diatchenko v. District Atty. For Suffolk* (Mass. 2013) 1 N.E.3d 270, is unavailing.

fundamental notions of human dignity"'" [citation], the court must invalidate the sentence as unconstitutional.' [Citation.]" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1300.) "Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment. [Citation.]" (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82.)

Here, the LWOP sentence, "though undoubtedly harsh, does not shock the conscience and is not disproportionate" to Moffett's culpability. (*Blackwell, supra*, 3 Cal.App.5th at p. 202.) Moffett was convicted of first degree murder with special circumstances. This crime, "viewed in the abstract, is perhaps the most serious offense under California law, and the facts of this particular case do not remove it from this category." (*Ibid.*) As described in detail above, Moffett planned the armed robbery and gave Hamilton the gun used to kill Officer Lasater. He was an active participant in the robbery: he pointed a loaded gun at the cashier, and threatened to kill a bystander. Moffett is not, as he claims, like the "immature 17-year-old defendant in *Dillon* who shot and killed his victim in a panic and was sentenced to life in prison despite the views of the judge and jury that his sentence was disproportionate to his moral culpability." (*People v. Williams* (2015) 61 Cal.4th 1244, 1290.)

"LWOP may be 'an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth' [citation], but the record before us does not compel the conclusion [Moffett] falls within that class. Although he was [four days] short of the age of majority when he committed the murder in this case, his criminal history as a juvenile was extensive. In light of his history and the very serious nature of his crime, [Moffett] has not demonstrated that his LWOP sentence is disproportionate to his individual culpability." (*Blackwell, supra*, 3 Cal.App.5th at p. 202.) We conclude the court did not impose cruel and unusual punishment in violation of the state constitution. (*Ibid.*)

III.

The Sentencing Minute Order and Abstract of Judgment Must Be Modified

Moffett's final claim concerns the imposition of the section 1202.4 restitution fine. As relevant here, the court stayed Count 7 and imposed a restitution fine of $10,000. In January 2015, the court granted Moffett's motion to modify the sentence and reduced the section 1202.4 restitution fine to $1,000. The previously-filed abstract of judgment lists the restitution fine as $10,000; the court did not amend the abstract of judgment.

Moffett contends the court erred by imposing a $200 restitution fine (§ 1202.4) on Count 7, because that count was stayed pursuant to section 654, and that the sentencing minute order and abstract of judgment must be modified to reduce the total restitution fine to $800. The People agree. (*People v. Le* (2006) 136 Cal.App.4th 925, 936.) We therefore modify the sentencing minute order and abstract of judgment to reflect a section 1202.4 restitution fine of $800.

DISPOSITION

The trial court is directed to prepare an amended sentencing minute order and abstract of judgment imposing a total restitution fine (§ 1202.4) of $800 and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.

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